the Canadian constitution. As Justice IDINGTON stated in a dissenting opinion when the principal case was in the Supreme Court of Canada, "I think we can, in arriving at the true interpretation of our BRITISH NORTH AMERICA ACT, especially on questions of this kind, receive most useful lessons both of instruction and warning from the experiences of that country (the United States), and from many of its master minds that have dealt with the solving of such problems as are now presented to us." *In re References by the Governor General and Council,* 43 Can. S. C. R. 536, 79. S. H. M.

REFUSAL OF SPECIFIC PERFORMANCE WHERE SUBSEQUENT UNEXPECTED EVENTS RENDER IT INEQUITABLE.—In the recent case of *Tazewell Coal & Iron Co.* v. *Gillespie,* 75 S. E. 757, the Supreme Court of Virginia refused to execute specifically a contract for the sale of lands on the ground that it would result in undue hardship and injustice to the defendants.

One statement of the rule of law in such cases, which will be found in many opinions, is that the fairness of a contract is to be judged according to the situation which existed when the contract was made. This statement is too broad, for it includes in its operation not only cases where the subsequent situation working hardship to one party should reasonably have been contemplated, but also cases where it should not. No court would now contend that the rule holds good to that extent. POMEROY, EQ. REM., § 797, 798; *King* v. *Raab,* 123 Ia. 632; *Pingle* v. *Conner,* 66 Mich. 187.

Another expression often indulged in by the courts in cases of the kind under discussion is that specific performance lies in the discretion of the court and will be refused where conditions have so changed since the date of making the contract as to work hardship or loss to parties not censurable in conduct. This statement is erroneous and misleading in two respects. First, it leads one to presume that a court of equity can do just as it pleases about granting specific performance, whereas this is conceded by all authorities to be untrue. FIELD, J., in *Willard* v. *Tayloe,* 8 Wall 557, makes use of this language, "This discretion is not an arbitrary or capricious one depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity." See also *White* v. *Damon,* 7 Ves. 35. (Lord Eldon). Second, the statement under discussion makes the hardship to the defendant in the suit for specific performance the sole test. This clearly renders immaterial any question as to whether the contract was fair when made. But numberless authorities could be cited in which mere inadequacy of consideration, apart from other inequitable circumstances, is held to be no bar to specific performance, whether the inadequacy existed when the contract was made or arose afterward by a change in the value of the subject matter of the contract. POMEROY, EQ. REM., § 797; 36 CYC. 616; *Cathcart* v. *Robinson,* 5 Pet. 264; *Cady* v. *Gale,* 5 W. Va. 547. In other words there are, contrary to the purport of this rule, cases in which the fundamental question is, was the contract fair when made.

From what has just been said it should be clear that neither the "hardship" test nor that of "fairness of the contract when made" has any practical value as a criterion for deciding cases. The "hardship" test unduly empha-

sizes the claim of a defendant on the consideration of the court; the test of the "fairness of the contract when made" does the same for the complainant's claim. An examination of the cases reveals the fact that the former was almost invariably laid down as the final test in cases where the equities were all in the defendants' favor and the latter when the contrary was true.

The fundamental rule which is now recognized by all authorities is,—Equity will not refuse specific performance of a contract on account of hardship to one party arising from a change of circumstances or from the occurrence of events which may reasonably be supposed to have been in the contemplation of the parties as possible contingencies when they entered upon their agreement. POMEROY, EQ. REM., § 797; 36 CYC. 616, 617 and cases there cited. On the other hand a hardship resulting from the subsequent happening of an injurious event, which was not contemplated by the contracting parties, does defeat specific performance. This rule does not unduly emphasize either the complainant's or the defendant's rights, and it is the only one under which all the authorities can be reconciled. The ultimate test to be applied in cases such as the principal case is whether the subsequent change or event which has occurred is such as must have been reasonably contemplated by the parties as a possible contingency when they contracted.

In the principal case the complainant corporation was organized in 1888 to purchase and sell mineral lands. Each of the original stock-holders, including the defendants, agreed to transfer his particular land-holdings to the complainant at certain specified rates per acre in exchange for stock. Defendants subscribed for a number of shares, intending to give therefor the whole of a certain tract, containing 1980 acres, which they held under a contract of purchase. The subscription contract provided that either party might have the land surveyed. Accordingly one Williams was employed by the defendants to survey this land, but by inadvertence he omitted a portion which is the land in controversy. The conveyance to defendants as well as the conveyance by them to the complainant included only 1572 acres (both being based on the erroneous survey), but both conveyances purported to transfer the whole tract at a certain rate per acre. In 1905 the corporation first discovered facts arousing a suspicion that all the tract had not been conveyed to it as per agreement, and accordingly Gillespie, one of the defendants, and May, another stockholder, were appointed a committee to investigate the matter. The defendants had already learned of the mistake, and were even then trying to obtain a corrected deed from their vendor, although they concealed from complainant any information as to these facts. Finally defendants obtained a corrected deed from their vendor and placed a tenant upon the land. Complainant tendered to the defendants the additional amount of stock to which they were entitled under the original subscription contract together with the amount of all dividends which would have accrued thereon and interest upon the dividends, and demanded a corrected deed to this tract from the defendants. Upon the defendants' refusal to make such a deed the complainant brought action to specifically execute the contract. The court held that this relief would work too great a hardship upon the defendants. It bases its opinion upon the fact that eighteen years

had elapsed since the contract was made, that great change of circumstances had meanwhile occurred, and that this change was not one contemplated by the contracting parties. The court cited the general rule as stated above as the one which it applied. However, in spite of the language to that effect used in several places, a close examination of the decision shows only an application in fact of the "hardship" test. The court lays all its emphasis on this question,—Is it fair to compel a party to convey land at the rate of $2.50 per acre which is now worth $40.00 per acre, in exchange for stock which has decreased in value from par to 55c on the dollar? The answer was negative, and considered as an isolated proposition, was probably correct. However, even in that light, it might be reasonably contended that the court had overlooked the rule that mere inadequacy of consideration will not defeat the specific performance of a contract, unless the inadequacy is so great as to shock the conscience and amount to conclusive proof of fraud. Case note, 14 L. R. A. (N. S.) 317.

In no part of the decision did the court squarely apply the test of the general rule; nowhere was the question asked and answered,—Can the court, by specifically enforcing this contract, put the parties in the position which they must reasonably have contemplated that they would now occupy, when they made this contract? The court did, in an indefinite way, go into the question of complainant's ability to perform as contemplated when the contract was made, but it entirely neglected or overlooked the fact that the performance that each subscriber really had in view was a transfer of stock which was worth par value at the date of the subscription and which contained in itself certain potential dividends that he expected to realize. By tendering the agreed amount of stock, together with dividends and interest, the complainant clearly complied with the contract as it was made by the parties.

The next question is whether the principal case can be supported on the remaining grounds on which the decision is based, if it is conceded that the performance tendered by the complainant was that contemplated in the contract. In other words, should the court refuse specific performance of the contract merely because a long time had elapsed since it was made, and a change of circumstances had occurred meanwhile which would cause specific performance to work injuriously to one party? In this connection, Vice-Chancellor PITNEY, in the case of *Keim* v. *Lindley* (N. J. Eq.), 30 Atl. 1063, 1084, says, "This change in value is put forward as such an unanticipated change of circumstances as will render the specific performance of the contract inequitable. Prof. POMEROY, (§ 1408) lays down the rule that this change of value, in order to operate as a defense, must either grow out of or be accompanied by an inexcusable delay on the part of complainant; and he adds that neither a rise in value nor a depreciation, nor a loss or injury to the property, will, in the absence of unreasonable delay in the plaintiff, avail the defendant as a bar to the relief sought by the complainant." See also POMEROY, EQ. REM., § 797.

The case of *Fitzpatrick* v. *Dorland*, 27 Hun. (N. Y.) 291, is directly opposed to the case just quoted. The facts in both of these cases were prac-

tically the same. The performance of the contract was delayed many years by litigation as to title, begun just before the contract was made. The land increased enormously in value in the meantime, and also became heavily encumbered with taxes. It appeared as a fact in each case that the parties expected, when the contract was made, that the litigation would last only a few weeks. In the New York case it was held that the fact that litigation would last so long was not contemplated by the parties when they contracted, and for that reason, together with the changes in values, etc., specific performance was refused. In the New Jersey case, where the decision was the other way, Vice-Chancellor PITNEY said, "But the parties acted deliberately upon the situation as it then appeared, and a mere mistake in judgment will not avail them. In fact no one then supposed that clearing an adverse possession would prove to be a serious matter or occupy any great length of time. All acted upon the contrary supposition. It is now too late for the defendants to set up their mistake of judgment in a matter of that kind as a defense to a contract fair in all its parts. The contract must be judged by the circumstances as they then existed." However, even conceding for the sake of argument that the holding of the New York case was correct (see the later case of *Gotthelf* v. *Stranahan,* 138 N. Y. 345, 352) and that the time of performance was an essential element, still it does not support the principal case. In the latter, any contemplation of time in the contract was, under the circumstances, necessarily absent from the minds of the parties. The element of time entered the case only as a result of a mistake for which neither complainant nor defendants were responsible.

One further matter should, perhaps, be noticed. Courts of equity do not always refuse specific performance where the circumstances have changed even if the change is not such as the parties must have reasonably contemplated. "It is the advantage of the court of equity, as observed by Lord REDESDALE in *Davis* v. *Hone,* 2 Sch. & Lef. 348, that it can modify the demands of the parties according to justice; and where as in that case it would be inequitable from a change in circumstances to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract or, what is the same thing, will take a decree upon a condition of doing or relinquishing certain things to the other party. The same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events or even from collateral circumstances, work hardship or injustice to either of the parties." *Willard* v. *Tayloe,* 8 Wall. 557; *King* v. *Raab,* 123 Ia. 632; *Gotthelf* v. *Stranahan,* 138 N. Y. 345, 352. This is especially true in option contracts of all sorts. For other instances where specific performance is thus conditionally allowed, see case note 10 L. R. A. (N. S.) 117 and 10 L. R. A. (N. S.) 125. The Virginia court's decision certainly seems very narrow when its spirit is compared with that of these cases. B. W. S.

IS VASECTOMY A CRUEL PUNISHMENT?—In *State* v. *Feilen* (Wash. 1912), 126 Pac. 75, the Supreme Court of Washington has upheld the validity of a